

United States v. Perry, No. 07-50489

JUN 06 2008

BERZON, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I would reverse and remand for resentencing. The district court applied an erroneous legal standard in determining whether the Sentencing Guidelines’ minor role adjustment applies. Perry’s conduct in attempting to avoid apprehension, especially his abandonment of the vehicle with the aliens still trapped in the trunk, in no way indicated that his role in the criminal scheme suddenly expanded beyond the “minor” category. If anything, it indicated the opposite: He was trying to save his own skin, not take it upon himself to make the criminal scheme succeed.

That there may be alternative bases in the record for denying the adjustment – which I tend to doubt – does not justify affirmance. The district court made quite plain that he was relying on the flight, not on other circumstances. I would therefore remand for resentencing.